***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

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# Court of Appeals, District of Columbia

**JANUARY TERM, 1910.**

**No. 2090.**

685

**No. 1, SPECIAL CALENDAR.**

HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, AND WALTER G. ROBINSON, TRADING AS H. F. DUTTON & CO., APPELLANTS,

*vs.*

EMILY E. PARISH, EXECUTRIX UNDER THE WILL OF JOSEPH W. PARISH, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

**FILED NOVEMBER 24, 1909.**

# COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

**JANUARY TERM, 1910.**

## No. 2090.

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**No. 1, SPECIAL CALENDAR.**

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HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, AND WALTER G. ROBINSON, TRADING AS H. F. DUTTON & CO., PETITIONERS, APPELLANTS,

*vs.*

EMILY E. PARISH, RESPONDENT, EXECUTRIX UNDER THE WILL OF JOSEPH W. PARISH, DECEASED, APPELLEE.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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...DD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 31, 1909.

# In the Court of Appeals of the District of Columbia.

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No. 2090.

HENRY F. DUTTON et al.
vs.
EMILY E. PARISH, &c.

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*a* Supreme Court of the District of Columbia.

At Law. No. 27030.

HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, and WALTER G. ROBINSON, Trading as H. F. Dutton and Co., Plaintiffs,

vs.

EMILY E. PARISH, Executrix under the Will of Joseph W. Parish, Deceased, and JOHN W. DOYLE, Defendants.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed June 30, 1886. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia the 5th Day of June, A. D. 1886.

No. 27030. At Law.

HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, and WALTER G. ROBINSON, Trading and Doing Business under the Firm Name & Style of H. F. Dutton & Co.,

vs.

JOSEPH W. PARISH and JOHN H. DOYLE.

The plaintiffs sue the defendants for money payable by the defendants to the plaintiffs, for that the defendant Joseph W. Parish

(as J. W. Parish) on the 18th day of April, A. D. 1885, by his promissory note, now overdue, promised to pay to the order of the defendant John H. Doyle, the sum of $3,500.00 one year after date, with interest at six per cent. per annum and the said payee endorsed and delivered the said note to the plaintiff and the said note was at maturity, duly presented for payment and was dishonored, whereof each of said defendants had due notice, but the said defendants did not, nor did either of them pay the same.

*Money Counts.*

And the Plaintiff sues the defendants for other money payable by the defendants to the plaintiff for goods sold and delivered by the plaintiffs to the defendants and for work done and materials provided by the plaintiffs for the defendants, at their request, and for money lent by the plaintiffs to the defendants; and for money paid by the plaintiffs for the defendants at their request; and for money received by the defendants for the use of the plaintiffs; and for money found to be due from the defendants to the plain-
2 tiff on accounts stated between them.

And the plaintiffs claim $3,500.00 with interest, according to the particular of demand herewith filed, besides costs.

H. B. MOULTON,
*Attorney for Plaintiff.*

*Notice to Plead.*

The defendants are to plead hereto on or before the first Special Term of the Court, occurring 20 days after service hereof otherwise judgment.

H. B. MOULTON,
*Attorney for Plaintiff.*

*Particulars of Demand.*

$3,500.00. WASHINGTON, D. C., *April* 18″, 1885.

One year after date I promise to pay to John H. Doyle or order three thousand and five hundred dollars with interest at the rate of 6% *per cent* per annum until paid at the office of Riggs & Co. Washington D. C. for value received.

(Signed) J. W. PARISH.

(Endorsed:)
John H. Doyle.
Protested.

3 *Affidavit, 73d Rule.*

DISTRICT OF COLUMBIA, *ss:*

Hosea B. Moulton being first duly sworn makes oath that he is the attorney of the plaintiffs named in the foregoing declaration, (to

wit: H. F. Dutton & Co.) that the plaintiffs became the holder of the promissory note therein declared on bona fide for value in the usual course of business, without notice and before the maturity of said note, and still own and hold the same, that the genuine signatures of the defendants Joseph W. Parish and John H. Doyle appear on said note; that at the maturity thereof the said note was duly presented for payment and was dishonored and thereupon due and proper notice was at once given to the defendants Joseph W. Parish and John H. Doyle that no portion of the principal sum or the interest due upon the said note has been paid or satisfied in any manner whatsoever but the whole of said note, and interest is now overdue and unpaid; that the cause of action of the plaintiffs in the said declaration is grounded upon the said note and that for such cause of action the plaintiffs claim to be due from, and affiant verily believes they have a just right to recover, against the defendants, exclusive of all set offs and just grounds of defense, what they claim in their declaration, and that said sum is justly payable by the defendants to the plaintiffs, to wit: the sum of $3,500.00 with interest on $3,500.00 from April 18th, 1885 at 6% per annum.

HOSEA B. MOULTON.

*Certificate of Notary.*

Sworn to and subscribed before me by the said Hosea B. Moulton on this 30″ day of June, 1886.

R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
*Ass't Clerk.*

4 *Summons.*

Issued June 30, 1886.

In the Supreme Court of the District of Columbia, the 30 Day of June, 1886.

At Law. No. 27030.

HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, and WALTER G. ROBINSON, Trading as H. F. Dutton & Co., Plaintiffs,
vs.
JOSEPH W. PARISH and JOHN H. DOYLE, Defendants.

P. Jury 3.86 Kirby.

The President of the United States to the Defendants, Greeting.

You are hereby commanded to appear in this Court, on the first day of its first Special Term, occurring 20 days after service of this Writ on you, to answer the Plaintiff's Suit, and show why he should

not have judgment against you for the cause of action stated in his declaration.

Witness:

D. K. CARTTER,
*Chief Justice.*
R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
*Assistant Clerk.*

[SEAL.]

H. B. Moulton, Attorney.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

5 *Marshal's Return.*

Served copies of the declaration, notice to plead, affidavit and this summons, on the Defendant, Jos. W. Parish July 3, '86. Jno. H. Doyle not to be found the 28 day of August 1886.

A. A. WILSON, *Marshal.*

*Plea of Defendant J. W. Parish.*

Filed Sep. 4, 1886.

In the Supreme Court of the District of Columbia.

At Law. No. 27030.

HENRY F. DUTTON, JOHN G. NICHOLS, HENRY G. ROBINSON, and WALTER ROBINSON, Trading under the Firm Name and Style of H. F. Dutton & Co.,

vs.

JOSEPH W. PARISH & JOHN H. DOYLE.

The defendant Joseph W. Parish for plea saith:

1. That he is not indebted as alleged.
2. That he never promised as alleged.
3. That the plaintiffs are not bona fide holders for value of the promissory note set forth in the plaintiff's declaration.
4. That the plaintiffs are not the owners of the promissory note set forth in the declaration.
5. That the promissory note set forth in the plaintiff's declaration was given by this defendant to the defendant John H. Doyle without this defendant receiving consideration therefor and the said
6 Doyle delivered the said note to the plaintiffs herein without them giving consideration therefor.

GLEN W. COOPER,
*Attorney for J. W. Parish, Defendant.*

DISTRICT OF COLUMBIA, *ss:*

Before me the Clerk of the Court in and for the District aforesaid personally appeared Joseph W. Parish who being duly sworn according to law deposes and says that he is one of the defendants in the above entitled cause and maker of the promissory note described in the declaration; that the said note was obtained from this defendant by the defendant John H. Doyle the payee therein without his giving this deponent any consideration for the same; and that said Doyle has delivered the said promissory note to the plaintiffs in this cause as this defendant is informed and believes without their giving consideration therefor, and that the said Doyle is yet the holder and owner thereof and not the plaintiffs in this cause. The defendant further deposes and says that the affidavit supporting the declaration in the aforesaid cause, is not made by any or either of the plaintiffs in the said cause, nor by any one acquainted with the facts alleged, or by one who has personal knowledge of any of the facts set forth in the said affidavit. And this defendant denies that the plaintiffs are bona fide holders for value of the said note and he denies that he is indebted to the plaintiffs in any matter whatsoever.

JOSEPH W. PARISH.

7 Sworn and subscribed before me this 28th day of July A. D. 1886.

R. J. MEIGS, *Clk.*,
By R. J. MEIGS, JR., *Ass't Clk.*

*Joinder in Issue.*

Filed Sep. 17, 1886.

In the Supreme Court of the District of Columbia.

At Law. #27030.

H. T. DUTTON & Co.
**vs.**
JOSEPH W. PARISH et al.

The plaintiffs joins issue upon the First, Second, Third, Fourth and Fifth pleas of defendant Joseph W. Parish.

H. B. MOULTON,
*Att'y for Plaintiffs.*

Supreme Court of the District of Columbia.

THURSDAY, *April 4th,* A. D. 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

At Law. No. 27030, Cal. 422.

HENRY P. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, and WALTER G. ROBINSON, Trading as H. F. Dutton & Co., Pl'ffs,

vs.

JOSEPH W. PARISH and JOHN H. DOYLE, Def'ts.

8 Now comes here the plaintiffs by their attorney Mr. Moulton as well the defendant John W. Parish by his attorney Mr. Cooper, and a jury of good and lawful men of this District, to wit: Clarence F. Norment, Laidler Mackall, M. R. Goddard, Edward Mayer, Samuel B. Bachrach, C. C. Lefler, Charles A. Edelin, I. M. Jackson, Thos. D. Singleton, Alex. Campbell, Thomas S. Nairn, Goodwin Y. At Lee, who being duly sworn to try the matters of difference between the parties on their oath say they find said matters in favor of the plaintiffs, and that the money payable to them by the defendant John W. Parish by reason of the premises is Three thousand and five hundred dollars with interest from April 18, 1885, until paid; Therefore it is considered that the plaintiffs recover against said defendant John W. Parish $3500.00 with interest from April 18 A. D. 1885, being the money payable by them to the plaintiffs by reason of the premises and $— for their costs of suit and have execution thereof.

*Scire Facias.*

In the Supreme Court of the District of Columbia, the 24th Day of *D*eptember, 1892.

No. 27030. At Law.

HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, and Walter G. Robinson, Trading as H. F. Dutton & Co., Plaintiffs,

vs.

JOSEPH W. PARISH and JOHN H. DOYLE, Defendants.

The President of the United States to the Defendant Joseph W. Parish, Greeting:

9 You are hereby commanded to appear before said Court, at its first special term occurring after service hereof, to show cause why the plaintiff ought not to have execution of their judgment for $3500.00, debt and damages, with interest from April 18, 1885, and $32.35 costs of suit, recovered against you in said Court on the 4th day of April, 1889, and $— additional costs; and further to do and perform what said Court shall consider in the premises.

Witness: Edward F. Bingham, Chief Justice.

[SEAL.]

J. R. YOUNG, *Clerk*,
By R. WILLETT, *Ass't Clerk*.

*Marshal's Return.*

Returned Oct. 1, 1892. Scire Feci as to Joseph W. Parish.
D. M. RANSDELL,
*U. S. Marshal.*

H. B. MOULTON, *Attorney.*

10 *Fi. Fa.*

Issued Oct. 1, 1892.

In the Supreme Court of the District of Columbia, the 1st day of October, 1892.

No. 27030.

HENRY P. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON and Walter G. Robinson, Trading as H. F. Dutton & Co., Plaintiffs,

vs.

JOSEPH W. PARISH and JOHN H. DOYLE, Defendants.

The President of the United States to the Marshal for said District, Greeting:

You are hereby commanded, that of the goods and chattels, lands and tenements of the defendant, Joseph W. Parish you cause to be made $3500.00 with interest from April 18, 1885, which the plaintiffs, on the 4th day of April, 1889, by the judgment of said Court in the above entitled cause, recovered against said defendant Parish, for money found payable to said plaintiffs and $36.50 for costs and charges about said suit expended, as appears of record; and return this writ into the clerk's office of said Court within 60 days, so endorsed as to show when and how you have executed the same.

Witness, Edward F. Bingham, Chief Justice of said Court.

[SEAL.]

J. R. YOUNG, *Clerk,*
By R. WILLETT,
*Assistant Clerk.*

11 *Marshal's Return.*

Returned Oct. 1, 1892. "Nulla Bona" (See order of Pl't'ffs' Att'y on back of writ.)

D. M. RANSDELL,
*U. S. Marshal.*

H. B. MOULTON, *Attorney.*

(Endorsed:) The Marshal will please return the within Fi. fa. "Nulla Bona." H. B. Moulton, Att'y for Pl'ff. Oct. 1/92.

Supreme Court of the District of Columbia.

FRIDAY, *June* 11, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford, presiding.

* * * * * * *

At Law. No. 27030.

HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON and Walter G. Robinson, Trading and Doing Business under the Firm Name and Style of H. F. Dutton and Company, Pl't'f,

vs.

JOSEPH W. PARISH and JOHN H. DOYLE, Def'ts.

Now comes here the plaintiff by its Attorney, Mr. H. B. Moulton and suggests the death of the defendant Joseph W. Parish, that he died intestate, and that Emily E. Parish has been duly ap-
12 pointed and has qualified as Executrix of said deceased in the branch of this Court holding a Special Term for Probate Court business, and moves the Court to summon said Administratrix to appear and defend this action; whereupon it is ordered by the Court that a summons issue to said Executrix to appear and make herself defendant in this action in place and stead of said decedent.

*Summons.*

Issued July 6, 1909.

Supreme Court of the District of Columbia.

At Law. No. 27030.

HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, and WALTER G. ROBINSON, Trading as H. F. Dutton & Co.,

vs.

JOSEPH W. PARISH and JOHN H. DOYLE.

The President of the United States to Emily E. Parish, Executrix of Joseph W. Parish, Deceased, Greeting:

Whereas, the said Joseph W. Parish, late of the District of Columbia, was summoned to be and appear in this court to answer the writ of Scire Facias issued herein, service of which writ was had upon said decedent;

And whereas, the said Joseph W. Parish, is since deceased, as appears by the suggestion of the plaintiffs;

Therefore, you are hereby summoned to be and appear before the said court on or before the twentieth day, exclusive of
13 Sundays and legal holidays, occurring atfer the day of the service of this writ on you, and show cause why the suit afore-

said should not be prosecuted to judgment on said writ of Scire Facias.

Witness, the Honorable Harry M. Clabaugh, Chief Justice of said Court, the 6th day of July, A. D. 1909.

[SEAL.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
*Assistant Clerk.*

*Marshal's Return.*

Emily E. Parish not to be found.
July 29, 1909.

AULICK PALMER, *Marshal.*
S.

JNO. RIDOUT.

*Alias Summons.*

Issued Oct. 6, 1909.

Supreme Court of the District of Columbia.

At Law. No. 27030.

HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, and WALTER G. ROBINSON, Trading as H. F. Dutton & Co.,
vs.
JOSEPH W. PARISH and JOHN H. DOYLE.

The President of the United States to Emily E. Parish, Executrix of Joseph W. Parish, Deceased, Greeting:
14

Whereas, the said Joseph W. Parish, late of the District of Columbia, was summoned to be and appear in this court to answer the writ of Scire Facias issued herein, service of which writ was had upon said decedent;

And whereas, the said Joseph W. Parish, is since deceased, as appears by the suggestion of the plaintiffs;

Therefore, you are hereby summoned as you have before been summoned, to be and appear before the said court on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service of this writ on you, and show cause why the suit aforesaid should not be prosecuted to judgment on said writ of Scire Facias.

Witness, the Honorable Harry M. Clabaugh, Chief Justice of said Court, the 6th day of October, A. D. 1909.

[SEAL.]

J. R. YOUNG, *Clerk,*
By H. BINGHAM, *Assistant Clerk.*

*Marshal's Return.*

Served copy of within summons on Emily E. Parish, Oct. 9, 1909.

AULICK PALMER, *Marshal.*
S.

15 *Motion to Strike Out Order and Quash Summons to Executrix.*

Filed Oct. 18, 1909.

In the Supreme Court of the District of Columbia.

At Law. 27030.

HENRY F. DUTTON & Co.
vs.
JOSEPH W. PARISH et al.

Now comes Emily E. Parish, Executrix of the Will of Joseph W. Parish, deceased, by Holmes Conrad and Leigh Robinson, her attorneys, and enters a special appearance for the purpose, and only for the purpose, of moving the Court to vacate and set aside the order heretofore passed by Mr. Justice Stafford on June 11th, 1909, to summon, as administratrix, said Emily E. Parish (described in the prior part of the order, as the duly qualified executrix of Joseph W. Parish, intestate) "to appear and defend this action" and to cause a summons to issue to said executrix to appear and make herself defendant in this action in place and stead of said decedent", for the following reasons, and on the following grounds:—

First. Upon the cause of action in said Cause No. 27030 at law, viz: a promissory note made by J. W. Parish to the order of one John H. Doyle, bearing date April 18th, 1885, for $3500.00 action was brought and on April 4th, 1889 judgment rendered against said J. W. Parish for $3500.00, with interest from April 18th, 1885, and that said judgment had ceased to be obligatory upon said J. W. Parish in his lifetime, and never has been and is not now a debt
16 which the said Emily E. Parish, executrix, could be compelled to satisfy.

Second. That said cause No. 27030 at law having long since died cannot now be revived by a summons to the Executrix of said Parish to appear and make herself defendant therein.

Third. That the only way in which a judgment can be revived is by *scire facias.*

Fourth. That the time within which the judgment could be revived has long since expired.

Fifth. That although on September 24th 1892 (no fieri facias having ever issued on said judgment) the plaintiff caused to issue the writ of scire facias, which on October the first 1892 was returned scire feci; and although on the same day, (in the absence of any

appearance or plea thereto by the defendant Parish) plaintiff caused the plea of *fieri facias* to issue returned on the same day by the plaintiff's order, *nulla bona* no fiat was entered thereon within a year and a day and none ever has been entered. Wherefore at the expiration of a year and a day from the issuance of the writ, the proceeding in scire facias was discontinued and, after that date was no longer a pending litigation.

Sixth. The executrix Emily E. Parish cannot be summoned to appear and defend an action long since dead beyond the power of recall, and which had so died in the lifetime of her testator against whom it had been filed.

HOLMES CONRAD,
LEIGH ROBINSON,
*For Emily E. Parish, Executrix.*

17 To H. B. Moulton, Esquire, and John Ridout, Esquire, Attorneys for Henry F. Dutton and Company:

Take notice that we will call this motion to the attention of the Circuit Court for action thereon, at 10 a. m. on Friday October 22nd, A. D. 1909, or as soon thereafter as counsel can be heard.

HOLMES CONRAD,
LEIGH ROBINSON,
*For Emily E. Parish, Executrix.*

Service ack'd this Oct. 16/09.

H. B. MOULTON,
JOHN RIDOUT,
*For Pl't'fs.*

Supreme Court of the District of Columbia.

FRIDAY, *October 29th,* 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 27030. At Law.

HENRY F. DUTTON & Co., Plaintiff,
vs.
JOSEPH W. PARISH et al., Defendants.

Upon consideration of the motion of Emily E. Parish, Executrix of the Will of Joseph W. Parish, deceased, filed herein by
18 her attorneys Messrs. Holmes Conrad and Leigh Robinson, to vacate and set aside the order passed herein by Mr. Justice Stafford on June 11th, 1909, it is ordered that said motion be, and the same is hereby granted at the cost of plaintiffs. To the granting of which motion counsel for plaintiffs excepts.

MONDAY, *November* 1*st*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

No. 27030. At Law.

HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, and Walter G. Robinson, Trading as H. F. Dutton & Co., Plaintiffs,

vs.

JOSEPH W. PARISH and JOHN H. DOYLE, Defendants.

Comes now the Executrix of the Will of Joseph W. Parish, deceased, by her attorney Mr. Leigh Robinson, and moves that in conformity with the order of the Court herein of October 29th, 1909, the summons issued herein July 6th 1909, and the Alias Summons issued herein October 6th, 1909, as well as the return thereon, be quashed. Whereupon, it is considered that said Summons, Alias Summons and Return be, and the same hereby are quashed at the cost of plaintiffs.

To the granting of which motion counsel for plaintiffs excepts.

19 *Order Allowing Special Appeal.*

Filed Nov. 19, 1909.

Court of Appeals of the District of Columbia.

No. 332, Original Docket. October Term, 1909.

Law. No. 27030.

HENRY F. DUTTON, JOHN G. NICHOLS, HARVEY G. ROBINSON, and Walter G. Robinson, Trading as H. F. Dutton & Co., Petitioners,

vs.

EMILY E. PARISH, Respondent, Executrix under the Will of Joseph W. Parish, Deceased.

On consideration of the petition filed herein by Henry F. Dutton, et al., praying the allowance of an appeal from the orders of the Supreme Court of the District of Columbia dated October 29, 1909, and November 1, 1909, it is by the Court this day ordered that said appeal be, and the same is hereby, allowed.

Per Mr. CHIEF JUSTICE SHEPARD,
November 12, 1909.

A true copy.
Test:
[SEAL.] HENRY W. HODGES,
*Clerk of the Court of Appeals*
*of the District of Columbia.*

20 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Nov. 19, 1909.

In the Supreme Court of the District of Columbia.

Law. 27030.

HENRY F. DUTTON and Others
vs.
JOSEPH W. PARISH.

The Clerk will include in the record on the Special Appeal herein, the following: Declaration, Summons to Parish and Return, Pleas, Joinder, Verdict, Judgment, Scire facias and Return, Fieri Facias and Return, Defendant Parish'- death suggested and summons ordered to issue to Executrix, Return of summons not to be found. Alias Summons, Return thereof, Special appearance and motion of Executrix, Order of October 29, 1909, Order of November 1, 1909.

Please give all orders and other papers in full.

H. B. MOULTON,
JNO. RIDOUT,
*Attorneys for Plaintiffs.*

21 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this record, in cause No. 27030 at Law, wherein Henry F. Dutton et als. are Plaintiffs and Emily E. Parish, Executrix, &c., et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22d day of November A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2090. Henry F. Dutton et al., appellants, vs. Emily E. Parish, &c. Court of Appeals, District of Columbia. Filed Nov. 24, 1909. Henry W. Hodges, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED
JAN 3 - 1910

IN THE Henry W. Hodges, Clerk.

# Court of Appeals, District of Columbia.

**JANUARY TERM, 1910.**

## No. 2090.

HENRY F. DUTTON ET AL.

*vs.*

EMILY E. PARISH, EXECUTRIX UNDER THE WILL OF JOSEPH W. PARISH.

## BRIEF FOR APPELLANTS.

### Statement of the Case.

On June 30, 1886, the appellants brought an action at law in assumpsit against Joseph W. Parish as maker on a promissory note.

On April 4, 1889, judgment was recovered thereon.

On October 1, 1892, execution was issued thereon and returned on that day *"nulla bona."*

On September 24, 1892, a writ of *scire facias* to revive said judgment was issued and was personally served on said Parish. Thereafter, and before any fiat was obtained, said Parish died and by his will appointed the appellee executrix thereof.

On June 11, 1909, plaintiffs, having suggested the death of said Parish, obtained an order that a summons be issued to said executrix requiring her to show cause why said judgment should not be revived.

Due service of an alias of this summons was made.

Service was made October 9, 1909.

On October 18, 1909, the executrix appeared specially by counsel and filed a motion to vacate the order which was passed on June 11, 1909.

On October 29, 1909, an order was passed vacating the order of June 11, 1909, to which order of October 29, 1909, counsel for appellants excepted.

On November 1, 1909, said last-mentioned order was enlarged so as to quash the said summons, to which order counsel for appellants also excepted.

Application having been duly made therefor, a special appeal from both said last-mentioned orders was allowed and the cause is here on that appeal.

## Assignments of Error.

The court below erred as follows:

**1.**

In taking jurisdiction of and acting upon said appellee's motion filed October 9, 1909.

**2.**

In passing said order of October 29, 1909.

**3.**

In passing said order of November 1, 1909.

## ARGUMENT.

The citation of authority in support of the first assignment of error is of course quite unnecessary.

The Rule No. 1 of the court below provides among other things:

"That the terms of the circuit court shall begin on the first Tuesdays in January, April, and October."

The order attacked was made at the April term, 1909.

The motion to vacate it was filed October 9, 1909, and acted on October 29, 1909.

The October term of the court below ended October 4, 1909, so that the court below had lost jurisdiction to vacate said order before the motion attacking it was filed.

It is frankly admitted by counsel for appellants that this point was not made below because counsel inadvertently supposed that the motion to vacate had been filed during the April term.

But as this error is jurisdictional and appears plainly on the record, and if called to the attention of the court below could not have been cured, it is submitted that this court will, of its own motion, notice and decide the point.

The court will, it is believed, be the more inclined to do this because on the merits the orders below were clearly erroneous.

Without waiving the jurisdictional question, as indeed we cannot, we will briefly call the court's attention to the erroneous character of the orders of which we complain.

The principles which are involved are stated with admirable clearness and precision in the case of

Parsons *vs.* Hill, 15th D. C. Appeals, 532.

In its last analysis the defense attempted to be raised is limitations.

At law such a defense *must be pleaded.*

Phillips vs Negley
117 N. C. 465
Garland v Davis
Hughes 148

This court under the peculiar circumstances will take judicial notice of the great length of time during which the litigation over the Parish ice claim was pending.

It was not until after the appellee had the good fortune to obtain the valuable services of her present eminent counsel that victory was finally achieved.

This history of that case makes the reasoning in Parsons *vs.* Hill, *supra,* most applicable.

It is quite apparent that for such a question as is involved in appellee's motion to be heard upon a mere motion will inflict great hardship and even injustice upon appellants, while, if the defense is pleaded, excuses for apparent delay could be replied, the issues thus produced tried by a jury, and, if the contentions of appellee are well founded, it can be safely assumed, judging the future by the past, that her eminent counsel will, especially as against their present humble antagonists, win another signal victory, unless our cause is, as we believe it to be, absolutely just, in which event we can rely upon the maxim so fully recognized in this court, "thrice armed is he who hath his quarrel just."

Indeed, but for their high standard of professional loyalty, our learned antagonists would prefer to be defeated here and to win on the merits, because, as the court is well aware, neither of them desires to prevail on a mere technicality.

We therefore submit that the orders complained of should be reversed.

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JOHN RIDOUT,
*Attorneys for Appellants.*

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED
JAN 6 - 1910

Henry W. Hodges.
Clerk.

IN THE

# Court of Appeals, District of Columbia.

**JANUARY TERM, 1910.**

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## No. 2090.

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HENRY F. DUTTON ET AL.

*vs.*

EMILY E. PARISH, EXECUTRIX, &C.

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## BRIEF IN BEHALF OF APPELLEE.

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HOLMES CONRAD,
LEIGH ROBINSON,
*For Appellee.*

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## No. 2090.

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EMILY E. PARISH, EXECUTRIX, &C.

## BRIEF IN BEHALF OF APPELLEE.

On April 4, 1889, the plaintiffs in this special appeal recovered a judgment against the late Joseph W. Parish for $3,500, with interest from April 18, 1885 (Rec., p. 6).

On the 24th of September, 1892 (although no *fieri facias* had issued thereon), a writ of *scire facias* to revive said judgment was issued (*Id.*), and on October 1, 1892, was returned *scire feci* (*Id.* 7). On the same day, October 1, 1892, a writ of *fieri facias* was issued and, at the request and direction of the plaintiff's attorney, returned *nulla bona* (*Id.*). No fiat has ever been entered in said *scire facias* proceeding, and no further step was taken by the plaintiff until July 6, 1909 (Rec., p. 8); that is to say, more than twenty years after the entry of judgment, on April 4, 1889. It is not pretended that the *fieri facias,* issued on October 1, 1892, re-

vived the suit, for, if it did, the suit so revived would have perished on October 1, 1904, and that would be fatal to the present contention. Hence nothing whatever has been done in twenty years to revive the judgment recovered on April 4, 1889. In the absence of such revivor the judgment aforesaid finally died on April 4, 1901. For the same reason no suit was pending to which the executrix could be made a party. The situation was what it would have been if no judgment ever had been rendered in favor of the plaintiffs and no suit brought by them against Parish.

It is erroneously stated in appellant's brief (p. 2) that on June 11, 1909, an order was issued for a summons to said executrix "requiring her to show cause why said judgment should not be revived." The order was for a summons to said executrix "to appear and make herself defendant in this action in place and stead of said decedent" (Rec., p. 8). This summons was served October 9, 1909. On October 18, 1909, the said Emily E. Parish entered a special appearance for the purpose of making a motion to vacate said order (*Id.*). The reasons therefor being conclusive, the said order was vacated October 29, 1909 (*Id.*, 11, 12).

## ARGUMENT.

### I.

It is respectfully submitted that the whole contention of the plaintiffs has been conclusively disposed of by the decision of this court in *Collins vs. McBlair,* 29 App. D. C., 355. In this case two judgments were recovered by Collins against McBlair on April 27, 1875. Executions, issued thereon September 27th, were returned October 5, 1875, *nulla bona. Scire facias,* issued April 4, 1887, was returned April 4, 1887, and fiat was entered thereon June 29, 1887. *Fieri facias,* issued thereon the same day, was returned *nulla bona* August 27, 1887. March 20, 1893, the death of Joseph B. Collins,

was suggested, and Agnes B. Collins was made party plaintiff as his executor. May 13, 1899, *scire facias* was again issued to revive for a second time, and was returned May 13, 1899, *scire feci.* No appearance was made by the defendant to the writ, but no action was taken thereon until October 23, 1903, *when the plaintiff appeared and obtained a fiat on each judgment.*

In respect thereof this court said: "The act (Maryland Act of 1715, ch. 23, sec. 6), under which the proceedings to keep alive the judgments in controversy were had, provided, among other things, that no judgment shall be good and pleadable or admitted in evidence against any person 'after the debt or thing in action above twelve years' standing.'" That these judgments were revived by the fiat rendered on the *scire facias* June 11, 1887, and were alive on May 13, 1899, when the last *scire facias* was sued out, is conceded. Had the fiat then been granted they would undoubtedly have been revived for twelve years more. As before stated, no action was taken thereon, however, until October 23, 1903, more than fourteen years having elapsed since the last fiat.

* * * * * * *

The appellant's contention is that the *scire facias* is of the nature of an original action to recover upon the judgment and had the effect, therefore, to keep it alive until the order of fiat thereon more than two years later. The doctrine seems to have prevailed in Maryland from an early day that *scire facias* to renew a former judgment is a judicial writ, which may, however, be converted into an action by appearance and plea thereto (*Weaver vs. Boggs*, 38 Md., 255, 264, and cases cited). It is not the equivalent of an action upon the judgment. As a judicial writ its function is to continue the effect and have execution of a former judgment (Foster, *scire facias,* pp. 11, 13). If the defendant appears and enters a plea, setting up such matter as may be commonly pleaded in bar of a former judgment, the pro-

ceeding under the writ then becomes converted into an action. If not so converted into an action by the appearance and plea of the defendant, it remains a judicial writ merely, the life of which is ended and its force spent after a year and a day from the date of issuance.

* * * * * * *

After most careful consideration the general term of the Supreme Court of the District in 1892 approved the doctrine of *Vanderheyden vs. Gardenier, supra; Crumbaugh vs. Otterback,* 9 Mackey, 434, 450, 451. Mr. Justice Cox delivered an able opinion in that case, from which we make the following extract:

* * * After reviewing the decision in *Vanderheyden vs. Gardenier, supra,* he makes the following remark, that is particularly applicable in this case: "But to hold that a mere return of service to a *sci. fa.,* with a suspension of further proceedings, constitutes a pending action of indefinite duration, would make the act of limitations a mere nullity." This court then carefully distinguished the case under consideration from that of *Parsons vs. Hill,* 15 App. D. C., 532, 537, so much relied on by the present appellant. That case involved the question of the discontinuance of an action of assumpsit through failure to enter formal continuances and to issue alias summons in regular succession from time to time. The ordinary summons was issued immediately after filing the declaration, but returned not served, because the defendant was not within the jurisdiction. No continuances were formally entered, and alias summons executed upon the defendant, who, in the meantime, had returned to the jurisdiction, was not issued for nearly two years after return of the original summons. It was held that the action had not become discontinued by reason of this delay and failure to issue alias process at regular intervals until service could be had. The defendant had sustained no prejudice through the delay. There is an essential distinction between the discontinuance of an ordinary action at law through failure to

issue alias summons therein in regular order and the discontinuance of a proceeding by *scire facias,* which is a mere judicial writ and not an action on the judgment. * * * Having held that the *scire facias* was a judicial writ, expiring within a year and a day from its issuance, and that the failure to enter *fiat* thereon within that time operated a discontinuance of the proceeding, *it follows that the subsequent order of fiat, without a new writ before the expiration of twelve years from the last renewal of the life of the judgment, cannot bind the defendants. As in the case of a nonsuit in a formal action, the defendant was out of court, and jurisdiction over him could not be maintained save through service of additional service or notice.* It is elementary that a proceeding once discontinued formally or by express operation of law cannot be revived and made effectual in a court having jurisdiction of the subject-matter without notice to the party affected thereby. The judgment or order entered without such notice is of no force or effect, and its invalidity can therefore be shown in a collateral proceeding" (*id.*, 357-361).

II.

Had the suggestion and motion brought before the court on June 11, 1909, correctly stated the facts, it should have been, and doubtless would have been, apparent to the justice in the trial court that an order for "a summons issue to said executrix to appear and make herself defendant in this action in place and stead of said decedent" (Rec., p. 8) could not have been made. The executrix of Joseph W. Parish had prosecuted as such in the Supreme Court of the District of Columbia, in this court, and in the Supreme Court of the United States an action at law, decided in the latter court in May, 1909, and instituted in the Supreme Court of the District of Columbia three years earlier. Had the suggestion and motion of June 11, 1909, correctly stated the facts (as it is respectfully insisted should have been done) the court's attention would

have been called to the following: That the said J. W. Parish died on December 26, 1904—*i. e.*, three years after the judgment against him was utterly extinct—and that on April 7, 1905, the said Emily E. Parish "duly qualified as executrix of the last will and testament of her father, Joseph W. Parish, deceased." The code of law in force in this District is explicit as to the total lack of power in the year 1909 to bring in the said Emily E. Parish, executrix, as defendant to any suit which might have been pending against the said Joseph W. Parish when he died, on December 26, 1904. The law is: "If the proper representative of the deceased defendant be not made a party to the action within one year from the death of said defendant, the action shall abate as to such defendant; *Provided, however,* That where the representative of the deceased is an executor or administrator, *the plaintiff shall have six months after the issuance of letters testamentary,* or of administration within which to make such representative a party." (Code § 236.)

If, then, instead of the writ of *scire facias* issued on the 24th of September, 1892, there had been pending against Joseph W. Parish in December, 1904, an action of debt or assumpsit or any other, which had never been brought to trial even, the said Emily E. Parrish, executrix, could not have been made a defendant thereto on June 11, 1909, and a court would have been wholly without jurisdiction to make such an order. It is, therefore, exactly true as stated in the second ground for vacating and setting aside the order of June 11, 1909: "That said cause No. 27030, at law, having long since died, cannot now be revived by a summons to the executrix of said Parish to appear and make herself defendant therein (*id.*).

## III.

In this condition of affairs the appellant submits that the order of court for a summons to "issue to said executrix to appear and make herself defendant in this action in place and stead of said defendant" was entered on June 11, 1909,

the April term of court, and that the motion to vacate was filed October 9, 1909, and acted on October 29, 1909, after the April term had ended. Therefore, the trial court "had lost jurisdiction to vacate said order before the motion attacking it was filed."

It is a well-settled rule that a court has no power after the expiration of a term at which a judgment is rendered to open or vacate the same. But even in the case of a judgment—that is, the sentence of a competent tribunal—as a result of proceedings *inter partes* instituted therein there are exceptions equally well settled. A court may at any time vacate or set aside a judgment which is void; for example, a judgment rendered without the necessary jurisdiction.

"The Circuit Court of the United States adopted a rule that the *capias* should be served personally, or, if the defendant be not found, by leaving a copy thereof at his other residence or usual place of abode at least twenty days before the return day thereof. The marshal made the following return to a writ of *capias:* 'Executed on the defendant Hardeman by leaving a copy at his residence.' This service was neither in conformity with the statute nor the rule. Therefore, when the court gave judgment by default against Hardeman and an execution was issued, upon which a forthcoming bond was given and another execution issued, and at a subsequent day the court quashed the proceedings and set aside the judgment by default, this order was correct. When the judgment by default was given the court was not in a condition to exercise judgment."

*Harris vs. Hardeman,* 14 How., 334.

In this case the judgment by default was entered at May term, 1839. A writ of *fieri facias* was sued out in March, 1840, and a forthcoming bond executed by Hardeman on the 20th of April, 1840, and in pursuance thereof another *fieri facias* was sued out June 11, 1840.

"Upon the application of the defendant Hardeman at the May term of the Circuit Court in the year 1850 until which

time the proceedings in this case had been stayed, the court quashed the forthcoming bond and *fieri facias* sued out thereon, and set aside the judgment, purporting to be a judgment by default against the defendant, as being unwarranted upon the face of the proceedings and therefore void" (*id.*, 337-8).

But if the foregoing be true of a judgment entered as final to determine the result of proceedings *inter partes*, how much more must it be true as to an application made in the absence of and without notice to the party intended to be affected by it. There was no appearance of the said Emily E. Parish, and no general appearance ever has been entered for her.

The proposition that an order granted on an *ex parte* application, with no opportunity to the one to be affected by it to appear and contest the premises, is irrevocably binding, notwithstanding the fact that the grounds upon which the order was granted could be contested, and were successfully contested, so soon as the opportunity to do so was afforded, would seem to be a legal solecism. The copy of the summons was served on Emily E. Parish on October 9, 1909. Her motion to strike out the order was filed October 18, 1909 (Rec., p. 10).

## IV.

*The Motion to Strike Out was the Proper Proceeding in the Premises.*

On an appeal by the plaintiff from an order of the Supreme Court of the District of Columbia granting a motion by the defendant in an action at law to vacate an alias summons and discontinuing the cause, the order appealed from was affirmed by this court.

*Hopp vs. Pickford,* 30 App. D. C., 81.

HOLMES CONRAD,
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